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No. 90-83

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In The
Supreme Court of the United States
October Term, 1990

MARK N. SMITH,

Petitioner,

vs.

ROOSEVELT COUNTY, MONTANA and
SHERIFF JOHN Q. GRAINGER,

Respondents.

On Petition For A Writ Of Certiorari
To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI

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QUESTION PRESENTED

Whether Petitioner Smith was afforded due process of law when a jury determined that his termination as a deputy sheriff for being grossly inefficient was justified.

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OPINIONS BELOW

The opinion of the Supreme Court affirming the judgment of the District Court of the Fifteenth Judicial District, Roosevelt County is reported at ___ MT ___, ___ P.2d ___, 47 St.Rep.506, (March 8, 1990) (see Petitioner's Petition for Writ).

STATEMENT OF JURISDICTION

STATEMENT of jurisdictional requisites are adequately set forth

The jurisdictional
in the Petition.

STATEMENT OF THE CASE

STATEMENT, Petitioner Smith was terminated by

On July 19, 1988, by the Sheriff's Department. The causes for the termination were listed in a letter dated July 19, 1988 (see Petitioner's Appendix 4, pgs 90a-95a). Several causes were listed for his termination. Principal among them was the fact that he had recently mistreated a prisoner, one Julian Deserly. On August 17, 1988, Petitioner Smith filed a complaint and demand for jury trial.

On February 21, 1989, arguments were heard on Respondent's Motion to Dismiss and Motion to Impose Sanctions, and on Petitioner Smith's Motion for Summary Judgment and Motion in Limine. After the arguments were heard, all Motions were denied by the Court, and a trial date was set.

On March 28, 1989, a trial by jury took place. On March 30, 1989, the jury reached a verdict that Respondent Sheriff Grainger was justified in terminating Petitioner Smith for being grossly inefficient.

The Supreme Court of Montana entered its unanimous opinion affirming the judgment of the District Court. A Petition for Rehearing was denied.

SUMMARY OF ARGUMENT

Both arguments that Petitioner Smith's counsel makes in support of his Petition for Writ of Certiorari were previously addressed by the Montana Supreme Court and rejected. The rejection was based primarily upon the unerasable fact that Petitioner Smith's own counsel raised the issues about which he complained both at the jury trial and before the Montana Supreme Court, and which he now raises again in his arguments before this Court. (See Petitioner's Appendix 1, pgs 16a-18a.)

ARGUMENT

The issue in the present case is narrow and limited to the facts of this case. No amount of argumentation can convert it into one which would justify review on certiorari. The standards set forth in *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1970), *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972) and more appropriately in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976) were met by the trial court in this case. It was because of those standards that Petitioner Smith received his rights under Montana Law. It is well known that it is through Montana Law that his property interest in his employment was protected. Because Petitioner Smith was a tenured deputy as defined by Section 7-32-2107, M.C.A.¹ he was given a written Notice of

¹ That statute provides:

7-32-2107. Tenure for deputy sheriffs - grounds for termination of employment. Any deputy sheriff now

(Continued on following page)

Termination in accordance with Section 7-32-2108, M.C.A.,² and afforded his rights to a complete trial with a jury as set forth in Section 7-32-2109, M.C.A.³ At that

(Continued from previous page)

employed or who may hereafter be employed shall continue in service until relieved of his employment in the manner hereinafter provided and only for one or more of the following specified causes:

- (1) conviction of a felony subsequent to the commencement of such employment;
- (2) willful disobedience of an order or orders given by the sheriff;
- (3) drinking intoxicating liquor while in uniform or while on official duty or being intoxicated in a public place while in uniform or while on official duty;
- (4) sleeping while on duty;
- (5) incapacity materially affecting ability to perform official duties;
- (6) gross inefficiency in the performance of official duties.

² That statute provides:

7-32-2108. Written notice of termination of employment required. When a sheriff terminates the employment of a deputy, he shall at the time of termination cause to be served upon said deputy a statement in writing, subscribed and sworn to by the sheriff, setting forth the cause or causes for the discharge or termination of the deputy's employment.

³ That statute provides:

7-32-2109. Right to hearing on termination of deputy sheriff's employment. Any deputy sheriff whose

(Continued on following page)

trial, the Petitioner was found by a jury to have been grossly inefficient as a deputy sheriff (see Respondent's Appendix 1). The Montana Supreme court agreed with the decision of the jury and indicated that at all times anything that the Petitioner may have been complaining of was attributable to the Petitioner and his counsel. As a matter of fact, on pgs 12 and 13 of the Petition for Writ of Certiorari, Petitioner claims that the Sheriff Respondent was allowed to give testimony regarding matters set forth in his Notice of Termination "which were not the specific cause" for Petitioner's termination. He fails again to inform this Court that he, counsel for Petitioner, asked the questions regarding matters set forth in the Notice of Termination that he claims were not the specific causes for Petitioner's termination. In issue after issue, counsel for the Petitioner attempted to attribute to the District Court his own trial tactics as errors (see Petitioner's Appendix 1 pg 18a). In issue after issue, the Montana Supreme Court pointed out that counsel for the Petitioner, the same counsel who is now asking this Court to grant a writ of certiorari, was the person who elicited the testimony and the person who presented the evidence about which he then and about which he now complains. The Montana Supreme Court made it abundantly clear

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employment is terminated may, within 30 days from the date of the termination of his employment, make application to the district court of the county wherein the deputy was employed for a hearing before the court, with or without jury, on the charges resulting in the deputy's termination of employment or discharge.

that it was Smith's counsel who introduced materials about which Smith's counsel later claimed prejudice, and stated that "he can not now claim that he was denied a fair trial by the admission of evidence that he himself introduced" (see Petitioner's Appendix 1, pgs 17a-18a). Even in his Petition for Rehearing before the Montana Supreme Court (see Petitioner's Appendix 2, pgs 29a-88a), the same arguments are set forth by Petitioner Smith. The same trial tactics that failed are again labeled error and attributed to the trial court. (See Respondent's Appendix 2).

On these facts it is clear that the Montana Supreme Court has diligently answered each and every allegation of Petitioner and his counsel. There is no important question of constitutional law which requires review by this Court. As a matter of fact, there is a serious question as to whether or not this Petition for Writ of Certiorari raises any question other than a reiteration of Smith's counsel's failed trial tactics.

CONCLUSION

From the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Ralph J. Patch

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APPENDIX 1

INSTRUCTION NO. 25

You are instructed that "inefficiency" is defined as the quality of being incapable or indisposed to do the things required of an officer.

You are instructed that "gross" is defined as out of all measure; beyond allowance; not to be excused; flagrant or shameful.

APPENDIX 2

No. 89-258

**IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990**

MARK N. SMITH,

Plaintiff and Appellant,

vs.

**ROOSEVELT COUNTY, MONTANA, and
SHERIFF JOHN Q. GRAINGER,**

Defendants and Respondents.

**RESPONDENTS' OBJECTION TO PETITION
FOR REHEARING**

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RESPONDENTS' OBJECTION TO PETITION FOR REHEARING

COMES NOW, Respondents, ROOSEVELT COUNTY and JOHN Q. GRAINGER by and through their attorney, Ralph J. Patch, Roosevelt County Attorney and enters the following objection to a Petition for Rehearing on file in the above-referenced matter.

ARGUMENT IN OPPOSITION TO PETITION FOR REHEARING

The grounds for this objection are quite simple. There is nothing in the Petition for Rehearing that demonstrates that any fact was overlooked by the Montana Supreme Court when it rendered its decision affirming the jury verdict in this case. Counsel for former deputy Smith merely reiterates the arguments which were made at trial, set forth in his Appellate Brief, and repeated in his Reply Brief. These arguments can be summarized as "accept my theory of the case or you, namely the jury, the lower Court, and now the Appellate Court are making a mistake". The fact remains that Smith's counsel presented the evidence and elicited the testimony about which he continues to complain. By saying that he had to defend against these things is ludicrous. That was strictly a trial tactic which failed.

In the Petition for Rehearing Smith's counsel makes much of the questions asked of and answered by Sheriff John Grainger. These same questions were considered by this Court, they were before this Court, and they were answered by this Court. The only question remaining is how many times can Smith's counsel make the same argument and pretend that it is something new?

As to Smith's counsel's attempt to say that this Court ignored his third issue as he states on page 16 of the Petition for Rehearing, it is very clear that this Court merely combined that issue with issue number two, and pointed out to Smith's counsel that whatever error existed was the error of his counsel, not the error of the lower Court. It boggles the imagination to believe that because the Montana Supreme Court did not adopt, or swallow whole, issues framed by Appellant's counsel, that it somehow means the Appellate Court ignored the argument. There is neither rule of law nor of procedure that demands that the Montana Supreme Court adopt, word for word, paragraph for paragraph, mistake for mistake, redundancy for redundancy, of Appellant's counsel's issues. The fact that the Court chose not to parrot Smith's counsel's issues certainly does not demand a rehearing, let alone an oral argument.

Smith's counsel refers to three (3) so-called "teacher cases." This is another example of counsel attempting to reargue what has already been decided and presents nothing new. The question really is, how much longer does the lower Court, and now the Appellate Court, have to put up with the tunnel-vision-approach of Smith's counsel which ignores the real issues of the case. We are now faced with a Petition for Rehearing that only reargues what has been previously argued and decided. It even attempts to add issues to this case which were never objected at the trial, or raised on appeal. More particularly, it attacks the Sheriff's Department's procedure and implies that evidence existed which had supposedly disappeared and which would have somehow vindicated

Smith's bizarre behavior. The trial court was not impressed, the jury was not impressed, and this Court was certainly not impressed with Smith's groundless argumentation. In summary, the decision of this Court nowhere conflicts with the employment statute of Deputy Sheriffs. The decision of the Court recognized that former Deputy Smith acted in a grossly inefficient manner and was dismissed in accordance with statutory procedures and afforded at every step of the way due process.

This objection is respectfully submitted this 28th day of March, 1990.

/s/ Ralph J. Patch
Ralph J. Patch
Roosevelt County Attorney
